No. 09-1077

IN THE

Supreme Court of the United States

SEACOR MARINE LLC,

Petitioner,

v.

GRAND ISLE SHIPYARD, INC. and
THE GRAY INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should deny reconsideration of the *en banc* decision of the United States Court of Appeals for the Fifth Circuit which correctly found that for contract disputes, courts must look to the "focus of the contract" to determine the situs of the controversy and the scope of application of the Outer Continental Shelf Lands Act?

RULE 29.6 DISCLOSURE STATEMENT

Respondent Grand Isle Shipyard, Inc., a Louisiana corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent The Gray Insurance Company, a Louisiana insurer, is a wholly owned subsidiary of Gray & Company, Inc., a Louisiana corporation.

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STATEMENT AND PROCEEDINGS BELOW

The dispute involves the question of whether Louisiana law applies to the contract between Grand Isle Shipyard, Inc. ("GIS") and BP American Production Company ("BP"), as well as the third-party beneficiary, Seacor Marine, LLC ("Seacor"), for services performed on fixed platforms on the Outer Continental Shelf off the coast of Louisiana. The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") correctly concluded that it did. Seacor now asks the Court to grant *certiorari* to correct the *en banc* decision of the Fifth Circuit.

The Fifth Circuit's decision establishes the test applicable to contract disputes involving work on fixed platforms on the Outer Continental Shelf. Considering the issues in the case pursuant to Supreme Court and Fifth Circuit law governing contracts, the Fifth Circuit found that the "focus of the contract test" was the appropriate test to apply in determining the situs of the controversy and the scope of application of the Outer Continental Shelf Lands Act ("OCSLA")[1] in contract cases.

The contract dispute involved in this case arose out of Seacor's attempt to enforce indemnity and insurance obligations contained in a Master Maintenance and Construction Services Contract ("MMCSC") between BP and GIS. Pursuant to the MMCSC, GIS provided welders and laborers to perform platform repairs, including grating repairs, to BP's fixed platforms located

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1. 43 U.S.C. §1331 *et seq.*

on the Outer Continental Shelf off the coast of the State of Louisiana. Seacor, pursuant to a separate contract with BP, provided the vessel M/V SEAHORSE IV ("SEAHORSE") and other vessels to transport GIS' employees to and from the fixed platforms where the work was to be performed. Seacor sought to invoke the indemnity obligations of GIS and its insurance coverage provided by The Gray Insurance Company ("Gray") related to an incident in which Denny Neil, a GIS employee, was injured in a fall aboard the SEAHORSE while he was being transported from one fixed platform to another.

GIS and Gray filed a declaratory judgment action in the United States District Court for the Eastern District of Louisiana to resolve the contractual dispute. The district court granted GIS' and Gray's motion for summary judgment on the indemnity issue, finding that Louisiana law applied,[2] and that the Louisiana Oilfield Indemnity Act[3] barred Seacor's claim for indemnity and defense under the contract.

Following an appeal by Seacor and reversal by a Fifth Circuit panel, the Fifth Circuit *en banc* upheld the earlier decision by the district court and determined that the court must look to the focus of the contract to determine situs. Where, as here, the focus of the contract relates to work to be performed on the Outer Continental Shelf, state law applies as surrogate federal law, and thus Louisiana state law must be applied to this

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2. *Grand Isle Sh[illegible]rd, Inc. v. Seacor Marine, LLC*, No. 06-1405, 2007 WL 287[illegible], at *3 (E.D. La. 2007).

3. La. Rev. Stat. 9:2780 (1995).

contract dispute. The Fifth Circuit opinion establishes a test for determining situs and the scope of OCSLA applicability in contract cases. The Petition for a Writ of Certiorari to reconsider the Fifth Circuit's decision should be denied.

REASONS FOR DENYING THE PETITION

1. The Fifth Circuit correctly decided that for contract disputes arising from work done on the Outer Continental Shelf, courts should look at the focus of the contract to determine what law to apply.

As the Fifth Circuit has ruled, courts should distinguish between contractual indemnity claims and tort claims. "Once we recognize that the claim for indemnity is a claim based in contract rather than in tort, we see no reason to apply tort analysis to determine where the contractual controversy arose."[4] According to the Fifth Circuit, "[a]lthough it is clear that *Rodrigue* and *Tallentire* provide the situs rule for tort cases, it does not follow that contract cases triggered by an underlying tort depend on the situs of that tort, *i.e.*, the location of that occurrence."[5]

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4. *Grand Isle Shipyard, Inc v. Seacor Marine, LLC*, 589 F.3d 778, 787 (5th Cir. 2009) (*en banc*).

5. *Id.* at 785, citing *Rodrigue v Aetna Casualty & Surety Co*, 395 U.S. 352 (1969) and *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986)(both wrongful death tort cases).

In its *en banc* opinion, the Fifth Circuit distinguishes contract from tort claims, noting:

> . . . in determining whether state law applies in an OCSLA action, predicated on a contract, it is permissible to consider whether the contract at issue is a maritime contract before considering whether OCSLA situs has been established. Thus, if the contract sued upon is a maritime contract, maritime law applies and state law has no application so that the situs question need not be answered. However, if the contract sued upon is a non-maritime contract, then the situs question must be answered.[6]

Maritime tort law should not apply to disputes between parties over contract terms and interpretation. This is a contract dispute. It is not a dispute over the underlying personal injury to Denny Neil, a non-seaman, who was injured while being transported from one fixed platform to another. Neil and his company were hired to do construction and maintenance services on offshore fixed platforms. The Fifth Circuit's *en banc* ruling correctly avoids the application of maritime tort law to a non-maritime contract for construction and maintenance services on fixed platforms.

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6. *Grand Isle Shipyard v. Seacor Marine, LLC*, 589 F.3d778, 789, n.9 (5th Cir. 2009) (*en banc*).

2. Focusing on the contract to determine what law applies to contract disputes will provide the offshore oil and gas industry with a reliable way to allocate risk in their contractual arrangements.

The Fifth Circuit established the law of the circuit for contract cases as the "focus of the contract test." This standard gives appropriate consideration to the freedom of parties to contract, and ensures that contracts negotiated at arm's length between members of the offshore oil and gas industry will be interpreted and enforced by the courts. Applying the "focus of the contract test" will ensure that contract terms and provisions are given due effect, unlike the tort situs approach, which "prevents commercial parties from reliably allocating risk in their contractual agreements because they have no way of predicting where 'controversies' might arise and thus no way of knowing which law will govern."[7]

If the law were to be applied as the Petitioner suggests, for every case involving defense and indemnity obligations for an injury at sea, courts would be required to shift focus from the actual claim — a contract dispute — and conduct an analysis of maritime tort law. This would erroneously transform a commercial contract dispute concerning the enforceability of indemnity and insurance provisions into a maritime tort analysis. Parties entering into contracts would face uncertainty and additional tort lawsuits under Petitioner's theory.

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7. *Id.* at 787.

The Fifth Circuit has recognized the need to distinguish contract from tort disputes. Freedom and enforceability of commercial contractual agreements, as well as uniformity and predictability for commercial parties is at stake here. Overturning or "correcting" the Fifth Circuit's *en banc* decision could result in indemnity provisions in non-maritime contracts being transformed and interpreted under maritime tort law in the instances where non-maritime laborers are injured while being transported as passengers onboard vessels. This result would be particularly egregious because the commercial contracts have no connection to maritime service or transactions, and the locations where the work is performed are governed by OCSLA applied state law. This Court has previously noted its fear of "contract law *drown[ing] in a sea of tort.*"[8] Petitioner seeks exactly that result here.

This Court has long held that maritime contracts must have a connection to maritime service or maritime transactions.[9] The fortuitous location of an offshore accident should not dictate the obligations of indemnity in insurance between the parties who have contracted for non-maritime work on fixed offshore platforms or installations. Respondents submit that a non-maritime contract for work on a fixed platform off the coast of the State of Louisiana is precisely the type of contract which falls within the scope of OCSLA and requires the incorporation of OCSLA's choice of law principals.

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8. *East River S.S. Corp. v. Transamerica Delaba*, 476 U.S. 858, 871 (1986).

9. *See, e.g., People's Ferry Company of Boston v Beers*, 61 U.S. 393, 401 (1857); *New England Marine Insurance Company v. Dunham*, 78 U. S. 1, 26 (1870).

CONCLUSION

This Court has no reason to grant *certiorari* in this case. In its *en banc* opinion, the Fifth Circuit acknowledged the confusion caused by its prior decisions by applying maritime tort law to contract disputes arising from injuries on fixed platforms. The Fifth Circuit, in its ruling, considered a long line of Fifth Circuit cases to reach its conclusion.[10] The Fifth Circuit considered the *Offshore Logistics, Inc. v. Tallentire*[11] case, along with a long line of Fifth Circuit opinions interpreting offshore injuries and indemnity obligations in its ruling. This Court should not grant *certiorari*, because the Fifth Circuit's ruling does not conflict with the *Tallentire* case. The Petitioner's Petition for Writ of Certiorari should be denied, because the Fifth Circuit's decision is well-reasoned and based on an analysis of applicable law.

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10. In the *en banc* decision, the Fifth Circuit discussed the following Fifth Circuit and Supreme Court cases in its analysis: *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969); *Union Texas Petroleum Corp v. PLT Engineering, Inc.*, 895 F.2d 1043 (5th Cir. 1990); *Wagner v McDermott, Inc* , 899 F. Supp. 1551 (W.D. La. 1994); *Hollier v. Union Texas Petroleum Corp.*, 972 F.2d 662 (5th Cir. 1992); *Smith v. Penrod Drilling Corp.*, 960 F.2d 456 (5th Cir. 1992); *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512 (5th Cir. 1996); *Demette v. Falcon Drilling Co , Inc.*, 280 F.3d 492 (5th Cir. 2002); *Davis & Sons v. Gulf Oil Corp* , 919 F.2d 313 (5th Cir. 1990); *Gulf Offshore Co. v. Mobil Oil Co* , 453 U.S. 473 (1981); *Diamond Offshore Co. v. A&B Builders*, 301 F.3d 531 (5th Cir. 2002); *Texaco Exploration & Production, Inc v. AmClyde Engineered Products Co* , 448 F.3d 760 (5th Cir. 2006); and *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986).

11. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986).

Additionally, respondents respectfully request that this Court deny the Petition under the premise that the Fifth Circuit's *en banc* ruling does harm to the uniformity of maritime law. The Fifth Circuit issued its *en banc* ruling after a thorough review of Fifth Circuit and Supreme Court cases interpreting maritime and OCSLA jurisdiction. The ruling establishes the law in the circuit for contract disputes. A dispute arising out of a contract negotiated on specific terms between sophisticated parties should not be transformed into a tort case. There is no error in the Fifth Circuit's ruling, and there is no additional basis for this Court to grant the Petition for Writ of Certiorari. Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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